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No. 82-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MITSUI & CO., LTD., ET AL.,

Petitioners,

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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Respondents, Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd., file this Brief opposing the Petition for a Writ of Certiorari filed by Mitsui & Co., Ltd. ("Mitsui-Japan"), and Mitsui & Co. (U.S.A.), Inc. ("Mitsui-USA"). Consistent with their status in the trial court, Petitioners will be referred to herein as "Defendants" while Respondents will be called "Plaintiffs."

QUESTIONS PRESENTED

SHOULD THE SUPREME COURT GRANT CERTIORARI IN ORDER TO REVIEW ARGUMENTS AS TO THE NATURE, WEIGHT, AND SUFFICIENCY OF THE SUMMARY JUDGMENT EVIDENCE IN A CASE IN WHICH DISCOVERY HAS NOT BEEN COMPLETED?

ARE CONSPIRACIES WHICH OCCUR IN THE UNITED STATES AND ABROAD AND WHICH DIRECTLY AND SUBSTANTIALLY AFFECT THE FOREIGN COMMERCE OF THE UNITED STATES WITHIN THE SCOPE OF THE ANTITRUST LAWS?

DO PLAINTIFFS HAVE STANDING TO BRING AN ANTITRUST SUIT PREMISED ON ALLEGATIONS OF DIRECT INJURIES RESULTING FROM A CONSPIRACY TO ELIMINATE PLAINTIFFS AS COMPETITORS?

STATEMENT

On June 19, 1982, this case was seven years old.[1] It has been dismissed twice by the Honorable Ross N. Sterling, District Judge for the Southern District of Texas, on the basis of a motion for summary judgment and voluminous supporting documents filed by the Mitsui Defendants in 1977.[2] Both dismissals were reversed by the United States Court of Appeals for the Fifth Circuit in opinions which analyzed the complex evidence in this case in considerable detail.[3] Both opinions concluded that Defendants' various theories were supported neither by the governing pleadings nor by the evidence thus far adduced.[4] This Court denied the petition for writ of certiorari filed by Defendants after the first reversal[5] and denied Defendants' motion to stay proceedings filed after the decision under consideration.[6]

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[1] See *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876, 881-82 (5th Cir. 1982).

[2] *Id.* at 882.

[3] *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982); *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

[4] *Id.*

[5] *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980).

[6] *Mitsui & Co., Ltd., et al.* v. *Industrial Investment Development Corp., et al.*, Application for Stay of Execution and Enforcement of the Judgment of the United States Court of Appeals for the Fifth Circuit, No. A-1038 (denied June 3, 1982).

The deposition of Mitsui-Japan, which was noticed in 1977,[7] was begun in Tokyo in July of 1982. It has not yet been completed.

REASONS THE WRIT SHOULD BE DENIED

1. The decision below was based primarily on the court of appeals' rejection of Defendants' factual claims, and its review at this time would be a needless waste of this Court's resources.

Consideration of Defendants' motion for summary judgment has thus far consumed over five years and has generated twenty briefs,[8] five opinions,[9] two thousand pages of appendices, and numerous related motions, replies and other papers. These include some nineteen separate instruments in which Defendants seek a delay or continuance.[10] All of this time, expense and judicial effort has been invested in order to save Defendants the trouble of appearing for deposition and attending trial.

By their second petition for writ of certiorari,[11] Defendants ask this Court to sift through a record of thousands of pages and rule on factual questions which are peculiar to this litigation. They also ask that these factual rulings be made not only before a

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[7] See 671 F.2d at 881.

[8] In the district court, see Docket Nos. 67, 75, 79, 81, 83, 113, 115, 117, 118. In the Court of Appeals for the Fifth Circuit, see C.A. No. 78-1775; C.A. No. 81-2175. In the Supreme Court, see No. 79-552.

[9] See note 3, *supra* (court of appeals); C.A. 75-H-1041, Docket No. 84, 139 (district court).

[10] In the district court: Docket Nos. 10, 16, 80, 83, 94, 96, 104, 106, 131. In the court of appeals, C.A. No. 78-1775: Motion to Stay Mandate; Motion to Stay Proceedings; Response to Plaintiffs' Opposition to Stay; C.A. No. 81-2775: Motion for Extension of Time; Opposition to Plaintiffs' Motion to Expedite Appeal; Opposition to Motion to Issue Mandate; Motion to Stay Mandate. In the Supreme Court, No. 79-552: Application for Stay of Proceedings; No. A-1038: Application for Stay of Execution & Enforcement.

[11] Defendants' second Petition for Writ of Certiorari will be referred to as "the Petition".

trial, but before they have been deposed. As noted in the opinion below, this case is a textbook example of the wisdom of this Court when it directed that "summary procedures should be used sparingly in complex antitrust litigation."[12] The real issue in this case is not whether Plaintiffs have standing or whether the federal courts have jurisdiction, but whether the Defendants have met their burden under Rules 12 and 56. The evidentiary arguments contained in the briefs and discussed in the opinions below clearly show that this is not and never was an appropriate case for summary consideration.

It would serve neither the interests of justice nor the administration of the judicial system for this Court to review the record in this case before that record has even been completed. The decision below is not a final judgment. The court of appeals has merely remanded this case for completion of discovery and trial.[13] If there are any substantial legal questions, they should be decided after the facts have been determined.

2. The decision below on the issue of jurisdiction is consistent with the decisions of this Court and the circuit courts and presents no new questions for this Court's review.

Defendants' jurisdictional argument is premised upon a misstatement of the court of appeals' holding on this issue. According to Defendants, the court below has broadened extraterritorial jurisdiction to include almost anything:

> In the view of the court of appeals, an alleged foreign restraint of trade is within the scope of the Sherman Act so long as it "affects the flow of commerce into or out of the United States .....".

Petition, p. 6.

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[12] 671 F.2d at 884, quoting *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

[13] 671 F.2d at 889-90, 891.

What the court below actually held is as follows:

> A restraint that directly or substantially affects the flow of commerce into or out of the United States is within the scope of the Sherman Act. See *Continental Ore Company* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 443-44 (2d Cir. 1945).

671 F.2d at 883.

The rule announced and followed by the court of appeals is obviously not in conflict with *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981). That case involved activities which had occurred wholly abroad and which neither had, nor were intended to have, any effect on United States commerce.

The allegations and evidence in the case at bar, on the other hand, compel a finding of jurisdiction. The petition's description of the record, like its description of the court of appeals' opinion, is simply unreliable. The production from the timber concession was not just "potentially available" for the United States market, as Defendants claim.[14] On the contrary, Plaintiffs had specifically designated the United States as their main market long before this suit was filed.[15] Similarly, the competition involved in the instant case was not simply between Plaintiffs and Mitsui-Japan in the production of Indonesian logs,[16] but was between Plaintiffs and Mitsui-USA in the importation of lumber and wood products into the United States.[17] Nor do Defendants

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[14] Petition, p. 6.

[15] See Foreign Investment Application Form B (Revised Project Proposal), Plaintiffs' Trial Appendix. p. 234 (Rec. No. 75).

[16] Petition, pp. 3, 6.

[17] See 671 F.2d at 883; see also Brief of Appellants, C.A. No. 81-2175, United States Court of Appeals, Fifth Circuit, footnotes 90-103 and accompanying text.

discuss the allegations and ample evidence that acts in furtherance of the conspiracy were committed by Mitsui-USA on United States soil and in the actual course of United States commerce.[18]

The facts of this case would satisfy the jurisdictional requirements imposed by any decision on this issue since *American Banana.*[19] See, e.g., *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 704 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 604-05, 615 (9th Cir. 1976); *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 811-17 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed.2d 784 (1969); *Occidental Petroleum Corp.* v. *Butte Gas & Oil Co.*, 331 F.Supp. 92 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1262 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

3. The Court below resolved the standing issue in a manner consistent with the decisions of this Court and the other circuits.

In the case before this Court, Defendants conspired to eliminate Plaintiffs as competitors both in the production of Indonesian timber and in the importation of lumber and wood products to the United States.[20] Plaintiffs seek damages for lost profits from operations in direct competition with Defendants.[21] The allegations and supporting evidence establish a physical and economic nexus between the violation and the alleged harm and state a claim for relief of the type Congress sought to redress by

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[18] See 671 F.2d at 883; see also Brief of Appellants, *supra*, note 17, footnotes 58, 64, 105-06 and accompanying text.

[19] *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909).

[20] See 671 F.2d at 883-84.

[21] See 671 F.2d at 886, 887.

the antitrust laws.[22] This case clearly satisfies the requirements stated by this Court both in *Blue Shield* v. *McCready*, 50 U.S.L.W. 4723 (U.S. June 21, 1982) and in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

The standing argument in the petition is not based on the different factors addressed by this Court in *McCready* and *Brunswick*. Instead, Defendants argue that Plaintiffs have not suffered "antitrust injury" solely because of Defendants' assertion that their own conduct did not constitute an antitrust violation. [23] Fundamental to their current standing argument is the proposition that they were entitled to summary judgment on the issue of violation, and that the failure to address this question under the heading of "standing" was the sole ground for the decision below.[24]

The petition fails to mention that the court of appeals did consider and decide the very "violation" argument on which this standing theory is premised. The court expressly ruled that Defendants were not entitled to summary judgment on the issue because they had never properly presented it and had refused to submit to discovery on the question.[25]

It obviously makes no difference that the court below rejected Defendants' antitrust theory under Rule 56 rather than under Rule 12, which is Defendants' complaint.[26] Furthermore, as the petition itself concedes, Plaintiffs have also alleged a claim under Section 2 of the Sherman Act,[27] and it is clear that Defendants'

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[22] See 671 F.2d at 886.

[23] Petition, p. 10.

[24] Petition, pp. 9, 10.

[25] 671 F.2d at 889-90, footnote 16 and accompanying text.

[26] Petition, pp. 10, 11.

[27] Petition, p. 10, footnote 6.

"standing" defense under Section 1 would not be dispositive of the litigation even if it had merit.[28]

The purely academic complaint raised by Defendants' petition was not addressed in *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1299 (6th Cir.), *cert. denied*, 102 S.Ct. 388 (1981), or in *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977), and the instant case does not conflict with those decisions.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[28] Plaintiffs have also invoked diversity jurisdiction in connection with their non-federal or tort claims under 28 U.S.C. § 1332 (a)(3). The court of appeals has not ruled as to the existence of diversity jurisdiction. See 671 F.2d at 880-81, footnote 2.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been delivered to the attorneys for Petitioners, Mr. B. J. Bradshaw, Fulbright & Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, on September .., 1982.

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Fitzhugh H. Pannill, Jr.